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Chairman: Mr. Lelong ..... (Haiti)

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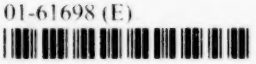

The meeting was called to order at 10.20 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Kanu** (Sierra Leone) said that the draft articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission constituted a comprehensive and balanced text. The Commission was to be commended for having addressed the most controversial issues. His delegation felt, however, that some of the provisions required further attention.

2. In attempting to distinguish between ordinary breaches and breaches of norms of a fundamental character, the Commission had originally posited the notions of international crimes and international delicts of a State, but had wisely decided instead to refer to serious breaches of obligations to the international community as a whole. His delegation had welcomed that approach but had expressed doubts about the precision of the term. The compromise language of the current article 40, paragraph 1, addressed some of those concerns by referring to a serious breach by a State of an obligation arising under a peremptory norm of general international law, a wise choice since the concept of peremptory norms was sufficiently defined by the Vienna Convention on the Law of Treaties and the jurisprudence of the International Court of Justice. Moreover, the definition of "serious" as contained in article 40, paragraph 2, was based on ideas in widespread use in international law.

3. His delegation would nonetheless welcome language that would prevent the assessment of the seriousness of a breach from being an arbitrary determination. The wording "international community as a whole" had been retained in a number of other articles, and his delegation was not convinced that departing from the language of the Vienna Convention was appropriate. Whatever language was adopted should, in any case, be without prejudice to the rights of persons or entities arising from the responsibility of a State, as set forth in article 33, paragraph 2.

4. His delegation welcomed the emphasis given to the principle of the irrelevance of internal law, expressed in the final draft of articles 3 and 32. Its inclusion reflected a well-established norm and gave an incentive to States to bring their domestic legislation into conformity with international standards.

5. The main difficulty with respect to countermeasures was to strike a balance between the need for flexibility and effectiveness, on the one hand, and the desire to prevent the abuse of countermeasures, especially when directed against smaller or weaker States. The final draft articles represented a step forward compared with the previous version in that they specified the obligations not affected by countermeasures (art. 50), recognized the principle of proportionality (art. 51), stipulated that countermeasures should be terminated as soon as the responsible State had complied with its obligations (art. 53) and in general established some important safeguards against the misuse of countermeasures.

6. His delegation was still concerned, however, about the unilateral assessment of the legitimacy of countermeasures. Moreover, some of the safeguards in article 52 would weaken the flexibility and effectiveness of countermeasures. The requirements of prior notification and negotiation in article 52, paragraph 1 (b), for example, imposed an obligation not recognized under international law, and the prohibition in article 52, paragraph 3 (b), against taking countermeasures when the dispute was pending before a court seemed incompatible with the possibility of taking urgent countermeasures rightly provided for in article 52, paragraph 2.

7. On the question of measures taken by States other than the injured State, his delegation welcomed the new wording of article 54 in the form of a saving clause much less open to abuse than the previous version but leaving open the possibility of a collective response by States within the context, for example, of the United Nations. Although several articles required improvement, his delegation thought that chapter II was useful overall and should be retained.

8. His delegation supported the recommendation of the Commission to the General Assembly that it should take note of the draft articles in a resolution and annex the articles thereto, and it would be willing to consider, at a later stage, negotiating a convention on State responsibility.

9. **Mr. Gómez Robledo** (Mexico) said that the draft articles adopted by the Commission were the most refined statement available of the rules governing the responsibility of States for internationally wrongful

acts and constituted an invaluable work of codification and progressive development of international law. The articles attempted to strike a balance between heavily debated opposing viewpoints in an area of international law that was rapidly evolving and in which the need for rules and standards was increasingly felt.

10. Unfortunately, like all products of compromise, the articles left some room for doubt and reservations. The most serious shortcoming was the lack of dispute settlement provisions, which seemed at best contrary to good sense and at worst a fatalistic acceptance that the injured State would inevitably resort to its own measures. His delegation was not convinced by the argument that dispute settlement provisions were only appropriate if the articles were to take the form of a convention.

11. With respect to article 25, his delegation agreed with the Commission that necessity as a ground for precluding wrongfulness was an exceptional case that should be subject to strictly defined conditions to safeguard against possible abuse by States, especially in view of the subjectivity of the phrases "essential interest" and "grave and imminent peril". In no case should the State invoking necessity be the sole judge of its existence, nor should the article be taken in any way as legitimizing certain concepts, such as anticipatory self-defence, that were not firmly grounded in the rules relating to the use of force and the definition of aggression.

12. Although the Commission had improved the wording of Part Two, chapter III, on serious breaches of obligations under peremptory norms of general international law, there were still problems with articles 40 and 41. His delegation could not agree that it was currently accepted that all States were obliged to cooperate to bring to an end a serious breach of a peremptory norm of international law. The broad language of the chapter invited abuse of countermeasures and ignored the system of collective security provided for in the Charter of the United Nations. Although "peremptory norms of international law" was a more precise wording than "obligations to the international community as a whole", it was open to subjective interpretation, because there was still no well-defined list of peremptory norms. Moreover, the earlier phrase had been retained in many of the draft articles.

13. His delegation was also concerned that by defining a "serious breach" as a threshold for the application of the articles, the Commission was implying the existence of a category of "non-serious" breaches of peremptory norms not mentioned in the Vienna Convention. Since the very concept of peremptory norms had been developed to safeguard the most precious legal values of the community of States, it was difficult to justify the distinction. His delegation felt that the best alternative was to eliminate chapter III of Part Two, on the understanding that nothing in the draft articles affected the provisions of the Charter of the United Nations.

14. In article 44, subparagraph (b), it was questionable whether the requirement that local remedies must be exhausted should be made dependent on those remedies being "available and effective". The rule of exhaustion of local remedies was well established in international law. A determination of their effectiveness implied a value judgement passed on the internal legal system of a State and could lead to abuse by allowing the injured State to bypass the legal remedies of the responsible State. The American Convention on Human Rights and the International Covenant on Civil and Political Rights made exceptions to the exhaustion of local remedies dependent not on an evaluation of their effectiveness but on whether their application was unreasonably prolonged, and the decisions of the Inter-American Court of Human Rights had been consistent in that regard.

15. As if article 42 were not broad enough, article 48 further expanded the opportunities for States other than the injured State to invoke the responsibility of a State and take measures against it, if the obligation breached was owed to the international community as a whole. It was unclear precisely which obligations were meant. His delegation would prefer the language of the Vienna Convention, which referred to "the international community of States as a whole". Moreover, the prerogatives of a State entitled to invoke responsibility should have been expressly limited to those mentioned in paragraph 2, in order to rule out any application of countermeasures by States other than the injured State.

16. Despite some doubts about the inclusion of Part Three, chapter II, on countermeasures, his delegation felt that the final result was balanced and reinforced the principles that countermeasures were limited in scope, were restricted to the purpose of securing compliance

with the obligation breached and must be proportionate to the injury suffered. Although those elements were insufficient to prevent abuses, they would help to guide the conduct of States.

17. On a drafting point, he wondered why the drafters had chosen to use the words "commensurate with" in the English version instead of "proportionate to" in draft article 51, since "proportionality" was used in the title and was a concept well established in international law.

18. His delegation had concerns about the provision in article 52, paragraph 2, whereby an injured State might take urgent countermeasures if necessary without notifying the responsible State or offering to negotiate with it. As in many other places in the draft articles, the decision was left entirely to the injured State, and the provision could have the effect of legitimizing abuses. Here, again, the lack of a dispute settlement mechanism was sorely felt.

19. His delegation had reservations about the inclusion of draft article 54, since it seemed to invite States other than the injured State to take countermeasures against a responsible State and was silent on other mechanisms that existed in the organized international community for dealing with breaches of international law.

20. Although his delegation had always been in favour of a convention as the only appropriate outcome for the important work done by the Commission over nearly half a century, the idea of a convention did not appear to enjoy a consensus at present. His delegation could therefore support a step-by-step approach towards the ultimate goal, as recommended by the Commission; that the General Assembly should simply take note of the draft articles, however, seemed inadequate as the first step. It would be better to allow States a year or two to weigh the text and commentaries carefully before deciding what to do with them. His delegation therefore proposed that the General Assembly should express its appreciation for the work of the Commission, call the attention of States to the draft articles and include an item on the agenda of the fifty-seventh session of the General Assembly entitled, "Responsibility of States for internationally wrongful acts". Under that agenda item, the Assembly could consider annexing the draft articles to a resolution and possibly taking future action on them, including the adoption of a legally binding instrument.

21. **Mr. Economides** (Greece) said that, with the submission of the draft articles, the Commission had filled an immense gap by codifying an area of international law — its most important area — that had been highly decentralized and poorly developed but was presently in transition from the status of exclusively customary law to that of written law. Being a consensus document, the articles, of course, represented extensive compromises.

22. He wished to draw attention to both the strong and the weak points in the articles, difficult though that would be, given the inevitable high degree of subjectivity involved. The first was the emphasis placed on the concept of the international community as a whole, to which States owed obligations. The concept was expressed explicitly in draft article 33, paragraph 1, implicitly in draft article 40 and again explicitly in draft articles 42 and 48, paragraph 1 (b). Thus in cases of breaches of international obligations to the international community and, a fortiori, in those involving *jus cogens*, not only a specially affected State but also other States were entitled to invoke the responsibility of the State which had committed the internationally wrongful act; the difference between the two situations was that the injured State acted in its own interest, whereas other States acted in a common interest, which amounted to nothing more nor less than that of the international community as a whole. That it should be seen as a distinct entity, with legally protected rights, boded well for the future both of the international community and of international law.

23. Another extremely positive aspect of the articles was the considerable impetus they gave to the peremptory norms of general international law (*jus cogens*), which had first been adopted by the 1969 Vienna Convention on the Law of Treaties and had since become part of international public policy. Obligations arising under them outweighed any other international obligation, whether agreement-based, customary or of any other nature. The draft articles devoted several significant provisions to such norms, including article 26, the wording of which was greatly preferable to that of draft article 21 as provisionally adopted by the Commission's Editorial Committee the previous year. Chapter III of Part Two — articles 40 and 41 — provided specifically for the international responsibility entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law, an approach that had

ultimately replaced the provisions on State crimes contained in the famous draft article 19 adopted on first reading. The term "crimes" had indeed been deleted, but the substance of the rules had been retained. There were also other articles, such as article 50, paragraph 1, which related, directly or indirectly, to obligations arising under such peremptory norms. The articles therefore substantially strengthened an institution of great significance in international law.

24. The third positive aspect of the draft articles was the concept of consequences envisaged for serious breaches, a concept that had developed gradually since the end of the Second World War. The process had begun with Chapter VII of the Charter of the United Nations and continued with the introduction of the concept of peremptory norms, the case law of the International Court of Justice, particularly its 1970 judgment in the *Barcelona Traction* case, the important advances in international criminal law, article 19 of the draft articles on State responsibility as put forward by Mr. Ago and adopted by the Commission on first reading in 1980 (the first reference to State crimes) and, lastly, the doctrine according to which, ever since Bluntschli had propounded it in 1868, a serious breach affecting the essential interests of the international community itself could not be treated in the same way as a minor breach causing simple damage to a State.

25. Serious breaches of obligations owed under *jus cogens* norms entailed the same consequences as those produced by any other internationally wrongful act, as outlined in articles 30 (a) (Cessation), 29 (Continued duty of performance), 30 (b) (Assurances of non-repetition) and, above all, 34 ff. (Reparation, which could take various forms). Of particular significance was the fact that restitution — re-establishing the situation that had existed before the wrongful act had been committed — was applied particularly strictly in cases of breaches that affected international public order: for example, cessation of illegal occupation and restitution of a territory to the State to which it belonged.

26. The articles also contained more specific consequences, contained in article 41, which obliged States to cooperate to bring to an end through lawful means any serious breach, not to recognize as lawful a situation created by a serious breach and not to render aid or assistance in maintaining that situation. Although only the first obligation was of a positive nature, while the other two entailed abstaining from a specific course of action, they amounted to international solidarity with the injured State and, ultimately, with the whole international community.

27. By the same token, serious breaches of such recognized peremptory norms as the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture and the right to self-determination should be tackled collectively at the global level. In that context, it was regrettable that the Commission had ultimately deleted draft article 42, paragraph 1, as provisionally adopted by its Editorial Committee the previous year, since it had provided for an additional consequence, namely, obliging the responsible State to pay damages commensurate with the seriousness of the breach, or punitive damages.

28. Overall the regime of State responsibility had been brought up to date: any serious breach of an obligation under peremptory norms of general international law entailed far more serious consequences, although it should be said that the word "serious" was superfluous, since any breach of a peremptory norm was, by definition, serious. Meanwhile, the traditional bilateral relationship between the injured and the responsible State had been abandoned, not only for breaches under draft articles 40 and 41 but for all collective obligations. In that context, draft article 48, which entitled States to act collectively, in effect exercising the rights of an injured State, including that of requiring performance of the obligation of reparation, was particularly significant. A State infringing collective obligations would therefore have to confront not just the injured State but also some or all of the other States that made up the international community. State responsibility would come to play an increasingly important role in the settlement of collective problems.

29. Another positive aspect of the articles was that there was less emphasis on the concept of injury as a prerequisite for acknowledgement of responsibility. Article 1, which stated that "Every internationally wrongful act of a State entails the international responsibility of that State", although astonishingly clear and simple, covered every eventuality. In that context, he recalled that many international obligations, particularly those of a negative nature, could be breached without injury necessarily being caused.

30. The draft articles had their weak points, but he would draw attention to only two. The first related to

article 52, on countermeasures. Such measures, even if peaceful, were archaic and retrograde, since their reliance on force obviously benefited powerful States. They also undermined the authority and prestige of international law; it was disturbing to see a country taking the law into its own hands. Paragraph 2 of the article allowed the injured State to "take such urgent countermeasures as are necessary to preserve its rights", even if the State held responsible denied its responsibility and accepted that the dispute should immediately be brought before a court. The provision, which sanctioned unilateral action, was most regrettable. Moreover, the purpose of the article had been skewed by the deletion — unjustified, in the view of his delegation — of former draft article 53, paragraph 4, provisionally adopted by the Editorial Committee the previous year, under which countermeasures other than urgent ones could not be taken while negotiations in good faith were continuing.

31. Another weakness was the absence of dispute settlement procedures to be used following any application of the draft articles, even though such procedures would be most useful. Originally, the draft articles had contained a third part dealing with dispute settlements (draft articles 54-60 and two annexes). As the representative of China and others had said, it was a regrettable omission which, it was to be hoped, would be rectified by States, preferably in the context of a plenipotentiary conference with the task of turning the draft articles into an international convention.

32. Although the draft articles contained some compromises over difficult or controversial issues, the overall effect was positive: comprehensive and concise, they would fill an enormous void in international law and would prove of great use to States and the international community. Moreover, they were the most important draft articles ever presented to the Committee by the Commission and fully merited speedy conversion into an international convention.

33. **Mr. Rao** (India) after pointing out that the second reading of the draft articles had been completed in four years, by contrast with the 40 years spent on the first reading, said that, as finalized, the articles had considerable merit. They had been trimmed down and the concepts involved made less complicated, with some of the most difficult articles having been reformulated. It was a matter of satisfaction to note that the final draft had taken into account recent relevant case law of the International Court of Justice and other legal and human rights bodies, a process which involved time-consuming work and car craftsmanship.

34. The articles also dealt with some of the m complicated and controversial subjects in internatio law, including the distinction between composite complex wrongful acts; continuing and compl wrongful acts; the exhaustion of local remedies; concept of State crimes; circumstances preclud wrongful acts, particularly compliance with obligati arising under peremptory norms of gen international law or *jus cogens*; the concept countermeasures; and the relationship between draft articles and rules specially agreed upon by St (*lex specialis*) in respect of specific aspects international law, such as those relating to hu rights, international trade or environmental legislat the law of the sea or the primacy of obligations un the Charter of the United Nations.

35. In addition, the articles no longer provided for concept of State crimes, which had been satisfacto replaced by the concept of the "serious breach" of obligation arising under a peremptory norm of gen international law (art. 40), a breach being serious involved a gross or systematic failure by responsible State to fulfil the obligation (art. 40, p 2). In that connection, he drew attention to the gen commentary under Chapter III and article 40, wh contained an explanation of the concept of a "seri breach", together with some useful examples peremptory norms of general international law. Commission had rightly decided that it was appropriate to set out examples of such norms in text of article 40 itself, any more than it was in the of article 53 of the Vienna Convention on the Law Treaties.

36. The commentary — like that on article 53 of Vienna Convention — mentioned the prohibition aggression, slavery and the slave trade, genocide, racial discrimination and apartheid. It also stated the prohibition against torture and certain basic rule international humanitarian law had justifiably acqui the status of a peremptory norm. However, anot example of a peremptory norm mentioned in commentary was the obligation to respect the righ self-determination. In the view of his delegation, right to self-determination essentially involved right of a people to seek independence from colo

rule: secession was not authorized in exercise of the right to self-determination in the post-colonial era.

37. He noted that the earlier concept of differently injured States, which had not been developed very far, had not been pursued. Article 48, however, identified the limits within which a State other than the injured State could invoke the responsibility of another State: it could seek cessation of the wrongful act and performance of the obligation only in the interest of the injured State or the beneficiaries of the obligation breached. The case of a plurality of injured States was covered separately. Under draft article 47, however, an injured State was not entitled to recover, by way of compensation, more than the damage it had suffered itself.

38. Drawing attention to the articles relating to countermeasures, most specifically articles 49, 50 and 51, he noted that, for lack of consensus, there was no provision specifying the need to seek resolution of a dispute by peaceful means before resorting to countermeasures. Nor was there any provision for punitive damages, a concept which had not been supported in practice.

39. Especially in the case of chapter III of Parts Two and Three, the articles seemed to be more akin to progressive development than to codification. The countermeasures referred to were only those not involving the use of force. The consequences of State responsibility were clearly explained as being options available to States, which could themselves decide on the manner and method of settlement of the claims involved. It could be assumed that the concept of integral obligations, which featured in draft article 48, paragraph 1 (a), would rarely come into play.

40. The articles addressed only secondary rules of State responsibility, which would apply only in the event of an internationally wrongful act defined by a primary rule. That called for a degree of universality still to be achieved in international law. Attaining that goal depended on sufficient progress being made on the right to development, the transfer of technology on an equitable basis, a more equitable system of world trade and intellectual property and the establishment of a more universal system of international criminal justice which would categorize as a war crime the use of weapons of mass destruction, including nuclear weapons, and would make terrorism a crime against humanity. In the present circumstances, the concepts of *jus cogens* and *erga omnes*, together with the notion of "serious breaches of obligations under peremptory norms of general international law", would remain only a distant rallying cry for most States. Indeed, they could be used by more powerful States to justify debilitating sanctions against less powerful poor nations.

41. In view of the complexity of the issues covered in the draft articles and the delicate balance achieved on the totality of the package, the General Assembly should express its appreciation to the Commission and take note of the draft articles, which could be adopted in a suitable form following a pause for study and reflection.

42. **Mr. Lobach** (Russian Federation) said the topic of State responsibility was one of the most important and complex the Commission had ever had to deal with. For the first time in the history of international law, the norms governing the responsibility of States for acts contrary to international law had been framed in writing, and Professor Crawford, as last in the line of distinguished jurists who had served as special rapporteurs on the topic, had scored a historic success. In the view of his delegation, the draft articles adopted on second reading were well balanced and took full account of State practice, case law and legal doctrine in the field. The Commission had achieved compromise solutions for most of the problematic issues on the basis of the proposals and observations made by Governments.

43. One of the most controversial of those issues was countermeasures. His delegation had always been in favour of including provisions on countermeasures, which were not themselves part of State responsibility but did feature in its implementation. They were an effective means for the injured State to achieve cessation of the unlawful acts and compensation for the damage done. However, they were justified only as long as those aims had not been achieved, and he was satisfied that Part Three, chapter II, dealt adequately with the conditions governing their use.

44. As for the right of States other than the injured State to resort to countermeasures, he recalled that the former draft article 54 had excited considerable opposition, not least because the scope for countermeasures seemed to be virtually unrestricted and could mean that they would be taken to protect a collective interest even while action taken by the

competent organs of the United Nations was in progress. Another argument had been that the means whereby an injured State could seek legal protection, and the corresponding right of a State having a "legal interest", could not be identical in scope. The former draft article 54 did have the advantage of encouraging States to cooperate under article 41 of the present draft, and of "stimulating" the responsible State to fulfil its obligations if the injured State was unable to resort to countermeasures of its own accord. It could too easily have been abused, however, and that risk had outweighed its practical advantages. He welcomed the decision to omit it.

45. The new article 54 had not preserved all its good points, however. The right of States other than the injured State to take countermeasures was now derived from only one criterion — that the measures should be lawful — whereas the previous draft article 54 stated that such a State could take countermeasures only to the extent that it would itself be entitled to take them. The new wording therefore gave such a State greater rights than the injured State.

46. Turning to Part Two, chapter III, he expressed approval of the differentiated approach taken to breaches of obligations, depending on their seriousness. International law certainly contained principles and norms the breach of which could be defined as serious, and the process of defining the obligations involved for the purposes of State responsibility had been a lengthy one. The most recent definition, "obligations arising under peremptory norms of general international law", was the best yet achieved. The concept of *jus cogens* was recognized in international practice and in the practice of international and national courts, as well as in articles 53 and 64 of the Vienna Convention on the Law of Treaties. The definition of a serious breach in draft article 41 adopted on first reading had raised the question of which interests, and which obligations, were intended. It was obvious that defining an internationally unlawful act as a crime would inevitably be a subjective affair.

47. The subjective element was reduced by the wording of article 41 adopted on second reading, according to which the obligation was owed to the international comn unity as a whole and was essential for the protection of its fundamental interests. However, the range of such obligations in international law was far from clear, and the classification of breaches according to that criterion could cause difficulty. He therefore supported the new definition, in article 40, of a serious breach of an international obligation as one "arising under a peremptory norm of general international law", an approach which avoided subjective classifications of the wrongful act and emphasized the special status of peremptory norms.

48. In that connection, he also welcomed the inclusion in the text of the new article 26, and the Commission's decision not to include in article 41 a provision on the obligation of the responsible State to make reparation reflecting the seriousness of the breach. That requirement was partly covered in article 31, and in any case an additional provision on reparation might seem to be referring to punitive damages, a concept unknown in international law.

49. He further welcomed the removal from article 41 [the former draft article 42] of the clause requiring States to cooperate "as far as possible" to bring the breach to an end. It remained unclear, however, what the "particular consequences" of a serious breach were. One solution might be to specify the forums in which States were to cooperate in order to bring the breach to an end. For that purpose, draft article 48, paragraph 2, could provide that the right of a State other than the injured State to claim performance of the obligation of reparation applied only in the case of a serious breach. In other cases, States could only claim cessation of the internationally wrongful act, with guarantees of non-repetition.

50. He welcomed the absence in Part One, chapter V, of humanitarian intervention as a circumstance precluding wrongfulness. However, he doubted whether it was right to include the provision, in article 25 (a), that necessity could be invoked as a ground for precluding the wrongfulness of an act if the act was "the only way for the State to safeguard an essential interest against a grave and imminent peril". If States were given that right, it could be used to justify completely unlawful acts. International law did not offer any definition of "an essential interest", so it would inevitably be defined in each specific instance according to a whole range of factors; indeed, the commentary showed how variously the courts interpreted the concept.

51. Finally, as to the form of the draft articles, his delegation was in favour of elaborating a universal convention which would stand alongside the Vienna

Convention on the Law of Treaties as a cornerstone of public international law. The adoption of a legally binding instrument in such a key area as State responsibility would certainly help to stabilize international relations. In view of the difficulties along that path and the views expressed in the Committee, however, his delegation supported the Commission's decision to recommend to the General Assembly that it take note of the draft articles in a resolution, to which the text would be annexed. That would be the first step towards the adoption of an international convention.

52. **Mr. Enkhsaikhan** (Mongolia) said that the topic of State responsibility had significant implications for international relations, for strengthening international peace and security, and for fighting international terrorism. The importance of the Commission's final report on the topic, and of its recommendations, could not be overstated. Several articles of the earlier drafts had already been cited in judgements and advisory opinions of the International Court of Justice, including the discussion of necessity as a factor precluding wrongfulness in the *Gabčikovo-Nagymaros* case. He therefore hoped to see the topic finally codified, and he welcomed the simplified language of the new draft and the user-friendly nature of the commentary.

53. The actual text of the draft articles was more balanced. He supported the deletion of the former draft article 19, since questions of individual criminal responsibility were now dealt with in the Statute of the International Criminal Court. On the other hand, the concept of the criminal responsibility of States was not widely recognized, and it was difficult to determine the *mens rea* of sovereign States. Distinctions should be drawn between ordinary breaches of international law and serious breaches which affected all States and the international community as a whole. In that sense, the articles in Part Two, chapter III, were an improvement over their predecessors, with the reference to "peremptory norms of general international law", a concept already present in article 53 of the Vienna Convention on the Law of Treaties.

54. His delegation also agreed with the definition in article 40, paragraph 2, of a serious breach as a "gross or systematic failure by the responsible State to fulfil the obligation". Some further clarification was needed: it should be decided which organ should determine whether an internationally wrongful act constituted a "serious breach". His delegation supported the provisions of draft article 41, provided they applied to norms of *jus cogens*. It also supported the collective sanctions of non-recognition and non-assistance, which had proved useful in the case of Namibia and Southern Rhodesia.

55. He also welcomed the general thrust of article 48, on the invocation of responsibility by a State other than the injured State. Some questions would have to be answered at a later stage, such as whether a State other than the injured State could take non-forcible countermeasures either alone or with others.

56. On the controversial question of countermeasures, he felt the draft articles represented a considerable improvement. He agreed that countermeasures could be a legitimate means by the injured State to compel cessation of the wrongful act, and also that it was necessary to guard against the abuse of countermeasures. His delegation regretted, however, that the final draft omitted the provision in the former draft article 54 for a non-injured State to take countermeasures. As a small State, Mongolia believed that the option of collective action, in the form of either sanctions or countermeasures, should have been preserved in the draft articles.

57. The question of dispute settlement depended ultimately on the form of the draft articles. His delegation believed an international convention was the appropriate form. In the meantime, however, he could agree with the Commission's recommendation for the General Assembly to take note of the draft articles in a resolution, annexing the text of the draft articles. In view of the importance of the topic, it should consider at a later stage the possibility of convening an international conference.

58. **Mr. Petrů** (Czech Republic) noted with satisfaction the completion of the draft articles and paid tribute to the special rapporteurs, especially, Mr. James Crawford. Generally speaking, his delegation was satisfied with the final form of the draft articles, especially the balanced provisions on countermeasures and the broader wording of article 31, paragraph 1. However, despite the detailed commentaries on serious breaches of obligations under peremptory norms (arts. 40 and 41) and breaches of obligations owed to the international community as a whole (art. 48), there remained some lack of clarity about the reason for the use of different terminology, the relationship between the two concepts and the purpose of establishing separate regimes of consequences for a serious breach

of the former and any breach of the latter. Moreover, since the draft articles did not address the issue of who was to decide whether the breach of a peremptory norm was of a serious nature, controversies were likely to arise in practice.

59. His delegation would prefer that the General Assembly, take note of and welcome the draft articles in a resolution to which the articles would be annexed. At the current stage, his delegation had no objection to the Committee's recommendation that the Assembly should consider the possibility of convening an international conference to examine the draft articles with a view to concluding a convention on the topic.

60. **Mr. Belinga Eboutou** (Cameroon) said while the draft articles were balanced and reflected both common law and State practice, they also embodied certain aspects of the progressive development of international law which were a source of legitimate concern. Thus, while article 48 (Invocation of responsibility by a State other than the injured State) followed a trend in current international law, its scope and practical consequences required further consideration.

61. He was even more concerned at the draft articles' approach to the issue of countermeasures, which could be resorted to only by the most powerful of States. Since they were used by some members of the international community and were recognized under international law, as the International Court of Justice had confirmed in the *Gabčikovo-Nagymaros Project* case, the Commission had rightly undertaken to establish a strict framework for the practice. However, the balance achieved in former article 53 (A/55/10) had been lost in the current version of the draft articles. While he supported deletion of the word "provisional", since countermeasures would necessarily be temporary in nature, he did not understand why paragraph 4 of former article 53 had been deleted. The purpose of countermeasures was to induce the responsible State to meet its obligations under international law; thus, the taking of countermeasures against a State that was pursuing negotiations in good faith amounted to an imposition of sanctions.

62. Equally important was the relationship between countermeasures taken by one or more States and measures decided upon by the Security Council under Article 41 of the Charter of the United Nations. Article 59 did not resolve that problem, since the Charter itself did not establish whether Council-mandated measures automatically entailed the cessation of countermeas by States or whether the two types of measures c be implemented simultaneously without violating principle of proportionality.

63. He was not convinced by the arguments ag the inclusion of a dispute settlement mechanism text which contained provisions on countermeas an impartial third party would be required in ord determine whether the accused State was r responsible, and thus whether the countermeas taken against it were legitimate and proportiona whether the violation was "serious" within the mea of article 40, paragraph 1. States could not compelled to submit their disputes for settlement, s many of them had not made the declaration u article 36, paragraph 2, of the Statute of International Court of Justice and there was, as ye comprehensive convention on compulsory arbitrati

64. Lastly, he hoped that the draft articles woul adopted during the current session of the Ge Assembly in a resolution establishing a time pe within which a diplomatic conference would convened with a view to the conclusion of a conve on the topic.

65. **Mr. Vilhena de Carvalho** (Portugal) said although the notion of "international crimes of S had disappeared from the draft articles, their pri objective remained unchanged and the issues o *cogens* and obligations *erga omnes* were adequa dealt with. It was true that there was no concrete practice on the issue of crimes of State and Security Council measures had been limited to notion of threats and breaches of the peace and ha even addressed that of acts of aggression. Howev would have been difficult for the Commission n distinguish between more and less serious breach international law. Thus, replacement of the articl international crimes of State by one on se breaches of obligations under peremptory norm general international law appeared to be an accep compromise.

66. The concepts of *jus cogens*, obligations *omnes* and international crimes of State or se breaches of obligations under peremptory norm general international law were based on a con belief in certain fundamental values of internat law which, because of their importance to international community as a whole, deserved t

better protected than others. Nevertheless, each of those concepts had a different rationale and a different function. *Jus cogens* focused on the idea of a material hierarchy of norms, the superior norms being non-derogable. Obligations *erga omnes* focused on the idea of a plurality of holders of a legal interest in protection of the community. Lastly, international crimes of State or serious breaches of obligations under peremptory norms of general international law focused, at the level of secondary rules, on the consequences of an internationally wrongful act. Although the Commission could have gone further in drawing consequences from the existence of peremptory norms and obligations *erga omnes*, his delegation considered that those important issues were adequately reflected in the draft articles.

67. There was a need to take a strict approach to countermeasures, since they were liable to abuse, and that potential was exacerbated by the factual inequalities between States. The real problem with regard to State responsibility was that there was no special international body competent to determine that a violation of international law had occurred, hence the importance of considering the inclusion of provisions on the settlement of disputes in an eventual draft convention on State responsibility.

68. His delegation welcomed the recommendations made by the Commission to the General Assembly and proposed that the Assembly should take note of the draft articles in a resolution. At the same time the possibility of convening an international conference for the adoption of a convention on the topic should be kept open.

69. Turning to chapter V of the report, he welcomed any legal developments which might increase the commitment to preventive action in order to avoid harm, particularly environmental harm. While the draft articles dealt in a satisfactory manner with the question of prevention, Portugal would have liked to see included in them such matters as harm caused to areas beyond national jurisdiction, as well as an explicit reference to the precautionary principle.

70. As to the Commission's recommendation to the Assembly that it should elaborate a convention on the basis of the draft articles now adopted, his delegation would prefer the final outcome of the work on the topic to deal in an integrated manner with the questions of prevention and liability. It therefore seemed premature to engage in the drafting of a convention relating only to the first of those two aspects.

71. **Mr. Taft** (United States of America), referring to chapter IV of the report, said that it would not be advisable to attempt to adopt a binding instrument on the topic. The draft articles and commentaries had been adopted earlier that year and had only recently become available. The General Assembly should, in its resolution on the report of the Commission, take note of the draft articles and commentaries and request Governments to study them carefully.

72. His Government welcomed a number of developments in the draft articles over the past year, notably the Commission's revision of certain articles to reflect more accurately existing customary international law. More specifically, the United States welcomed the Commission's work on serious breaches, including the clarification of the scope of articles 40 and 41 and the deletion of wording that might have been interpreted to suggest that punitive damages were permissible for serious breaches. His delegation also noted with satisfaction the decisions of the Commission to set aside the provisions on dispute settlement; he remained concerned, however, at the distinction drawn between serious breaches and other breaches, a distinction not found in customary international law.

73. His delegation noted with approval the reference in the commentary on article 9 to the exceptional nature of the attribution to a State of conduct carried out in the absence or default of the official authorities and the statement in the commentary on article 36 that financially assessable damages included moral damages suffered by a State's nationals due to personal injuries. Likewise, the United States welcomed the specification in the commentary on article 47, addressing situations in which more than one State was responsible for the international wrong, that the articles should not be interpreted to provide for joint and several liability.

74. His Government continued to be concerned at the treatment of countermeasures in the articles. While welcoming the recognition of the importance of countermeasures in the law on State responsibility, his Government believed that the articles included restrictions on the use of countermeasures that did not reflect customary international law or sound practice. In particular, it remained concerned about the

requirement in article 52, paragraph 1 (b), that a State must offer to negotiate before resorting to countermeasures, despite the undesirable burden that such a requirement placed on an injured State. Similarly, article 52, paragraph 3, required that all countermeasures, including urgent ones, should be suspended once the wrongful conduct had ceased and the dispute was pending before a competent tribunal. His delegation intended to look into whether such a constraint was warranted.

75. In addition, the requirement that countermeasures must be proportional did not make it sufficiently clear that there were two types of proportionality: proportionality in respect of the injury suffered and proportionality in respect of the means necessary to induce the wrongdoing State to meet its international obligations.

76. Article 16 and its commentary failed to make it clear, first, that responsibility implied a specific intent on the part of the assisting State to aid in the commission of the wrongful act and, second, that the assistance must make a significant contribution to the commission of the act. Similarly, the commentary appeared to contain inconsistent statements regarding the degree of responsibility arising from the assistance, in other words, whether the assisting State became responsible for the acting State's wrongful act in whole or only in part.

77. His delegation was continuing to study the Commission's treatment in article 30 (b) and its commentary of assurances and guarantees of non-repetition. That area was not well developed in international practice or jurisprudence, and it was uncertain whether the Commission's approach was the correct one.

78. While noting with satisfaction that the Commission had narrowed the definition of "injured State", as reflected in article 42 (b) (ii), his Government remained concerned that the definition might still be overly broad, and it intended to consider the matter further. The same applied to the suggestion in the commentary on article 14 that an expropriation might be a continuing breach of an international obligation, and the statement in the commentary on article 18 that "serious economic pressure" might be sufficient to constitute the coercion of another State to commit an internationally wrongful act.

79. With regard to chapter V of the report, he concurred with the Commission's decision to defer consideration of the question of international liability pending completion of the work on prevention. In his delegation's view, it was preferable to conclude binding agreements in the area of environmental impact assessment on a regional or topical basis, rather than at the global level.

80. Turning to chapter VII of the report, his delegation agreed that the Drafting Committee should recast article 9 to stipulate the requirement of continuous nationality. He did not believe that the Commission should depart from customary international law in that area.

81. While the wording of article 10 on exhaustion of local remedies was generally satisfactory, his delegation believed that it could be improved by providing that the national whose claim was to be espoused need only exhaust available and effective local remedies before espousal could occur, and by reconsidering the limitation that only those remedies that were available "as of right" must be pursued. In the United States, for example, that would mean that claimants would not have to seek relief from the highest court in cases where parties could not appeal as of right.

82. Lastly, additional thought should be given to the attempt to draw a line between direct and indirect claims in article 11.

83. With regard to chapter VI of the report, the Commission had found that conditional interpretative declarations appeared to be subject, mutatis mutandis, to the same legal regime as reservations. If further work confirmed that the same rules applied to the effects of reservations and conditional interpretative declarations, it might not be necessary to include in the draft Guide to Practice guidelines specifically relating to conditional interpretative declarations.

84. With regard to late formulation of reservations, his Government had considered the text of draft guideline 2.3.1, adopted at the Commission's previous session. The United States was concerned that the adoption of a guideline on that topic would introduce an element of instability into treaty practice without creating any discernible benefit. His Government noted that, in its capacity as depositary for a large number of multilateral treaties, it had not been faced with the late formulation of reservations, and it agreed with those

members of the Commission who believed that a guideline on the subject would have the effect of encouraging late reservations.

85. If, despite the concerns expressed, the guideline was retained, the term "objection" should not be used in a sense other than the way it was used in article 20 of the Vienna Conventions on the Law of Treaties. "Rejection" appeared to be the better of the two alternatives proposed in footnote 15 to the report.

86. Concerning the role of the depositary, the Commission had asked whether a depositary might refuse to communicate to the States and international organizations concerned a reservation that was manifestly inadmissible, particularly when it was prohibited by a provision of the treaty. At an earlier stage of international law, the answer might have been yes. However, the institution of the depositary had been changed by the widespread adoption of the 1969 Vienna Convention on the Law of Treaties. The United States in its depositary capacity now would, in examining an instrument of ratification, accession, acceptance, or approval, call the attention of the State concerned to any reservation in the instrument prohibited by the treaty, not included among reservations permitted by the treaty or, in its view, incompatible with the object and purpose of the treaty.

87. If, however, a State indicated that it wished to proceed, a "difference" within the meaning of article 77 of the Vienna Convention could arise between that State and the depositary as to the performance of the latter's functions. Article 77 required the depositary to bring such a question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

88. Lastly, with regard to chapter VIII of the report, his delegation supported the efforts of the Special Rapporteur and the Commission to develop further information from States before seeking to reach any conclusions on how to proceed in that area.

Agenda item 160: Convention on jurisdictional immunities of States and their property (*continued*) (A/C.6/56/L.7)

Draft resolution A/C.6/56/L.7

89. **Mr. Mikulka** (Secretary of the Committee) said that, pursuant to paragraph 1 of the draft resolution, the General Assembly would decide that the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property should meet from 4 to 15 February 2002. The session would have two meetings per day, with interpretation in the six official languages. It was estimated that there would be 30 pages of pre-session, 60 pages of in-session and 30 pages of post-session documentation to be processed in the six languages.

90. The conference-servicing requirements, at full cost in 2002, were estimated to be $282,500. The extent to which the Organization's capacity would need to be supplemented by temporary assistance resources could be determined only in the light of the calendar of meetings for the biennium 2002-2003. However, provision was made under the relevant section for conference services of the programme budget for the biennium 2002-2003, not only for meetings programmed at the time of budget preparation, but also for meetings authorized subsequently, provided that the number and distribution of meetings were consistent with the pattern of meetings of past years. Consequently, should the General Assembly adopt the draft resolution in question, no additional appropriation would be required under section 2, General Assembly affairs and conference services, of the proposed programme budget for the biennium 2002-2003.

91. *Draft resolution A/C.6/56/L.7 was adopted.*

92. **Ms. Burnett** (United Kingdom), explaining her position on the draft resolution just adopted, noted that the title of the item remained, as before, "Convention on jurisdictional immunities of States and their property". Her delegation understood that the aim of the Ad Hoc Committee in 2002 would be to work towards an instrument acceptable to all, whether binding or non-binding, and that, accordingly, the item as inscribed did not prejudice the outcome of the Committee's work. It was on that basis that her delegation had been prepared to support the establishment of such a committee the previous year.

The meeting rose at 1.10 p.m.